IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 64 OF 2006

AND

NOTICE OF MOTION NO. 200 OF 2006

AND

NOTICE OF MOTION NO. 226 OF 2006

IN

WRIT PETITION NO. 1650 OF 2005

1. Indian National Trust for Art & Cultural Heritage & Ors.
2. Tasneem Mehta
3. Darryl D'Monte .. Petitioners (In W.P. No.1650 of 2005)

V/s

1. The State of Maharashtra
2. The Municipal Corporation of Greater Mumbai
3. The Heritage Conservation Committee
4. The Mumbai Metropolitan Regional Development Authority
5. Neera Adarkar
6. The Maharashtra Housing & Area Development Authority
7. The National Textile Corporation Ltd. (North Maharashtra)
8. The National Textile Corporation Ltd. (South Maharashtra)

9. Morarjee Realties Limited

10. Mafatlal Industries Limited

11. M/s Hindustan Spinning & Weaving Mills Ltd.

12. The Ruby Mills Ltd.

13. Swan Mills Ltd.

14. Bombay Dyeing & Manufacturing Co. Ltd.

15. India Bull Real Estate Co. Pvt. Ltd.

16. Apollo Textile Mills through M/s Macrotech Construction Pvt. Ltd.

17. Mumbai Textile Mills through M/s Jawala Real Estate Pvt. Ltd.

18. Kohinoor Mills No.3 through Kohinoor CTNL Infrastructure Co. Ltd.

19. Dawn Mills

20. Shree Ram Mills Ltd.

21. Piramal Mills

22. Century Textiles & Industries Ltd.

23. Standard Mills No.3

24. Victoria Mills

25. Phoenix Mills

26. Khatau Mills

27. New Great Eastern Spinning & Weaving Mills Ltd.

28. Shreeniwas Mills

29. Swadeshi Mills

30. Mukesh Mills

31. Western India Mills

32. Prakash Mills

33. Maharashtra State Textile Corporation .. Respondents (In W.P. No.1650 of 2005)

Mr.Shiraz Rustomji with Mr.V.S. Khanavkar and Mr.Kedar Dighe for the Petitioners.

Mr.Ravi Kadam, Advocate General, with Mr.R.M. Sawant, Government Pleader, for Respondents No.1 and 6.

Mr.Rahul Chitnis i/b Mr.K.S. Dewal for Respondent No.3.

Mr.Shekhar Naphade, Senior Advocate with Ms.Meena Doshi for Respondent No.7.

Mr.Shekhar Naphade, Senior Advocate with Mr.Manish Desai and Ms.Deepti Mohan i/b Paras Kuhad & Associates for Respondent No.8.

Mr.P.N. Mody i/b Federal & Rashmikant for Respondents No.9 and 19.

Mr.E.P. Bharucha, Senior Advocate with Mr.Shyam Mehta i/b Federal & Rashmikant for Respondent No.10.

Mr.Shyam Mehta i/b Federal & Rashmikant for Respondents No.11, 12 and 14 and i/b Humranwala & Co. for Respondent No.13.

Mr.J. Dwarkadas, Senior Advocate with Mr.Zal T. Andhyarujinha with Mr.Mohan Salian i/b Gagrat & Co. for Respondent No.15.

Mr.Virag V. Tulzapurkar, Senior Advocate i/b Wadia Gandhy & Co. for Respondents No.17 and 30.

Mr.G.S. Godbole for Respondent No.18.

Mr.Pankaj Savant i/b Khaitan & Jaykar for Respondent No.20.

Ms.Alpana Ghone i/b Kanga & Co. for Respondents No.24 and 32.

Mr.G.R. Kinkhabwala i/b V.V. Juris for Respondent No.26.

Mr.Ajay Fernandes i/b Kanga & Co. for Respondent No.27.

CORAM : H.L. GOKHALE & S.R. DONGAONKAR, JJ.

DATE : 5TH MAY 2006

ORAL ORDER: (Per H.L. Gokhale, J.)

1. Notice of Motion No.64 of 2006 is taken out by the Petitioner Trust whereas Notice of Motion No.200 of 2006 is taken out by Respondents No.7 and 8 to the petition. Notice of Motion No.226 of 2006 is taken out by Respondent No.20 to the Petition.

2. Writ Petition No.1650 of 2005 is filed by the 1st Petitioner Charitable Trust (and two others), which Trust is interested in protection, preservation and enhancement of architectural material and natural heritage. The 2nd Petitioner is the Convenor of the Mumbai Chapter of the 1st Petitioner and expert in heritage architecture. The 3rd Petitioner is a renowned journalist who has extensively written on the textile mills in the city of Mumbai. The present petition is filed with a view to protect and preserve structures with heritage value within the textile mills in the city of Mumbai. The Petitioner Trust seeks support from

Regulation 67 of the Development Control Regulations framed for the city of Mumbai.

3. There are 33 Respondents to this petition. The 1st Respondent to the petition is the State of Maharashtra through the Secretary, Urban Development Department. The 2nd Respondent is the Municipal Corporation of Greater Mumbai. The 3rd Respondent is the Heritage Conservation Committee. From amongst the others, the 7th Respondent is the National Textile Corporation (North Maharashtra) and the 8th Respondent is the National Textile Corporation (South Maharashtra). Hereinafter both together are referred as "NTC". Respondents No.9 to 33 are various private textile mills in the city of Mumbai. Respondent No.20 from amongst them is Sriram Mills.

4. This writ petition was filed on 17th June 2005. At that time, another writ petition bearing No.482 of 2005 filed by Bombay Environmental Action Group was pending in this Court concerning interpretation of Development Control Regulation 58, which makes special provisions regarding redevelopment of the lands of cotton textile mills (i) which are sick and/or closed, and also (ii) those which are not sick or closed but require modernisation. The Petitioners wanted both

these petitions to be heard together, but it was the view of the Respondents that they be heard separately. The said Writ Petition No.482 of 2005 was subsequently allowed by another Division Bench of this Court on 17th October 2005 holding amongst others that the sale of lands of five mills belonging to the NTC was invalid in view of the interpretation given by the Court to D.C. Regulation 58. (This judgment has been subsequently reversed by the Apex Court in its judgment rendered on 7th March 2006 in the case of Bombay Dyeing and Manufacturing Co. Ltd. v. Bombay Environmental Action Group - (2006) 3 SCC 434).

5. The present writ petition was taken up by the earlier Division Bench on 28th October 2005 and by the order passed on that date, the Division Bench directed the authorities exercising powers under D.C. Regulation 67(3) to take appropriate steps in that behalf. It directed the Mumbai Heritage Conservation Committee (MHCC) - Respondent No.3 herein to make proposals with regard to the sites, buildings, structures in the textile mills in exercise of its powers under D.C. Regulation 67 within 12 weeks and further directed the concerned authorities to take appropriate steps within 2 months thereafter on receiving those recommendations.

6. By the aforesaid order, the Court admitted the petition, but observed in para 23 that the issues raised in this matter could be adjudicated after recommendations of MHCC are forwarded to the concerned authorities. In the said para, the Court noted the plea of the learned counsel for the Petitioners that if more time was wasted, then almost all structures located in the cotton textile mills would be brought down or demolished. This was apprehended in view of the NTC (North Maharashtra and South Maharashtra) - Respondents No.7 and 8 herein selling the lands of five textile mills and many other private mills either planning to sell their lands or seeking to demolish or alter the structures therein for modernisation. In the earlier part of the order, the Court had noted that the State Government was to give full cooperation to the MHCC. The NTC and the private mill owners were also to cooperate with MHCC in the matter of access to the mill premises. The Court, therefore, observed in para 23 as follows:-

> "23. We have noted the plea of Mr.Rustomjee that if more time is wasted, then almost all structures located in the Cotton Textile Mills would be brought down or demolished. However, we hope and expect that as assurances have been

given, by not only NTC, which is a public body, but, also by private mill owners with regard to access and survey of the structures, status-quo would be maintained till the above exercise is completed by MHCC. At this stage, it is not necessary to consider rival contentions about applicability of Section 46 of MRTP Act, 1966. The contentions on applicability of the same are kept open for being raised at an appropriate stage. Needless to state that copy of proposal/s recommendations of the MHCC should be made available to all parties as also placed on record of this Court."

7. The Petitioners thereafter took out Notice of Motion No.64 of 2006 on 3rd February 2006. This was after MHCC having completed the survey of 25 mills of NTC. MHCC had forwarded the proposal for listing of 85 structures of NTC as heritage structures, but a few out of them had been demolished leaving 77 behind. The survey of the private mills was still in progress at that time. The Petitioners submitted that the hope and expectation expressed by the earlier Bench of this Court in its order dated 28th October 2005 that status quo would be maintained with respect to the structures had been belied. Prayer (a) of this motion sought an order

of restraint against NTC from demolishing the structures mentioned in the proposal submitted by MHCC. Prayer (b) sought a similar order with respect to the structures on the lands of the private mills.

8. A Division Bench of this Court (of which one of us i.e. Gokhale J. was a member) heard this motion on 7th February 2006 and having heard the counsel for the Petitioners and also for NTC, granted an ad-interim order in terms of prayer (a) restraining demolition of the remaining 77 structures on the NTC mills. Prayer (b) of the motion was with respect to the structures on the private textile mills. The Court was informed that listing of the structures on the private mills was not yet over and it would take further 3 weeks. The consideration of prayer (b) was therefore deferred.

9. This Division Bench thereafter heard the motion on 28th March 2006. By that date, some of the private mill owners were served with the motion, whereas some were not and some 23 structures on the private mill lands had come to be listed. However, considering the apprehension with respect to the heritage structures on the private mills' lands an ad-interim order was passed in terms of prayer (b) of the motion on that date. We clarify that both these orders passed on 7th February

2006 and 28th March 2006 were ad-interim orders in terms of these two prayers of Notice of Motion No.64 of 2006. In the meanwhile, the Apex Court vide its judgment and order rendered on 7th March 2006 had allowed the SLP against the judgment and order of this Court in Writ Petition No.482 of 2005 in the case of Bombay Dyeing (supra). Respondents No.7 and 8 to the petition took out Notice of Motion No.200 of 2006 for vacating the ad-interim order passed on 7th February 2006 on Notice of Motion No.64 of 2006. One of the private textile mills, i.e. Shriram Mills (Respondent No.20 to the Petition), has taken out its own notice of motion bearing No.226 of 2006 to vacate the ad-interim order dated 28th March 2006 passed by this Court insofar as it applied to Respondent No.20.

10. As we have noted above, the earlier Division Bench, which admitted the writ petition on 28th October 2005, had observed in para 23 of the said order that issues raised in the petition could be adjudicated later after recommendations of MHCC are forwarded to the concerned authorities. Counsel for all the parties and particularly those for the Respondents have sought that the three motions be heard and decided earlier. All the three motions are connected motions and therefore they are all being heard and decided together.

11. Before we proceed to consider the submissions, we must note that after receiving the list of the heritage structures from MHCC, Mumbai Municipal Corporation has issued a notification inviting suggestions and objections which are to be submitted in writing to the office of the Chief Engineer (Development Plan) of the Municipal Corporation within one month from the date of the publication of the notification. The notification has been published firstly in an English newspaper "Free Press Journal" and later on in a Marathi newspaper "Maharashtra Times" on 22nd April 2006. The last date for filing suggestions or objections is 22nd May 2006.

12. (i). Mr.Rustomjee, learned counsel for the Petitioners, submitted that the heritage structures are important for their historical, aesthetic architectural and cultural values and D.C. Regulation 67 itself calls them as something that posterity would not willingly let die. He points out that section 22(i) of the Maharashtra Regional and Town Planning Act, 1966 (MRTP Act for short) specifically provides that the development plan amongst others is supposed to provide for preservation of heritage buildings and precincts. He submits that once the heritage structures are listed

and published by means of a notice, the planning authority is expected to have due regard to such proposals under section 46 of the MRTP Act. Section 43 of the MRTP Act does not permit any development of land after the development plan comes into force and, in his submission, this includes a proposal which has been published by means of a notice. The planning authority is not expected to grant permission to any such demolition of these structures until a decision with respect thereto is finally taken. He points out that "development", as defined under section 2(7) of the MRTP Act, includes demolition of any existing building or structure and a "development plan", as defined under section 2(9), includes a proposal also. Therefore, these structures cannot be allowed to be demolished.

(ii). He has emphasised provisions of D.C. Regulation 67 which provides for conservation of the listed buildings of heritage value. In his submission, the Commissioner has to act on the advice and in consultation with the Heritage Conservation Committee as provided under the said Regulation. The Regulation provides for grading of buildings from heritage point. In his submission, this Regulation is to be read independent of section 37 of the MRTP Act which section otherwise provides the procedure for modification of a

final development plan. This is also clear from Regulation 67(3). Mr.Rustomjee has drawn support for his submission with respect to section 46 of the MRTP Act from the judgment of the Apex Court in the case of **S.N. Rao v. State of Maharashtra - (1988) 1 SCC 586**, as also the judgment of a Division Bench of this Court in the case of **Anahita Pandole v. State of Maharashtra - 2004 (6) BCR 246**, which was concerning the lawfulness of the hoardings on heritage buildings protected under the very D.C. Regulation 67.

13. (i). Mr.Naphade, learned Senior Advocate appearing for the NTC, on the other hand, submitted that the listing of heritage buildings and structures by the Heritage Conservation Committee and the subsequent finalisation of the list has to be considered a legislative process. That process is yet to be completed and at this stage, no injunction can be granted. He secondly submitted that the proposal made by MHCC could not be considered as a factor to hinder the development permission, which NTC had already received under D.C. Regulation 58. In his submission, once the permission is granted under D.C.Regulation 58, there is no question of applying D.C. Regulation 67 to those structures and buildings. Besides, Regulation 67(2)(iii)(a) itself lays down that Regulation 67 will

apply only in Grade-I and Grade-II categories of heritage buildings for reconstruction undertaken under Regulations 33(7), 33(8) and 33(9). This was apart from his submission that D.C. Regulation 67(2) provides for restrictions on development and not absolute prohibition as such. According to him, on merits also, the structures could not be considered as of any heritage value and they all consisted of dilapidated structures.

(ii). Mr.Naphade pointed out that as far as textile mills of NTC are concerned, their integrated scheme for sale of some of their lands and development of the remaining textile mills was sanctioned by the Board of Industrial and Financial Reconstruction (BIFR) way back on 25th July 2002. The order of the BIFR was upheld by the Apex Court in its order passed on 27th September 2002 in **NTC (IDA) employees Association vs. Union of India reported in (2006) 3 SCC 604**. Thereafter, the Municipal Corporation had granted approval to the layout for sub-division submitted by NTC on 27th October 2004, under D.C.Regulation 58. This approval contained conditions 10 and 11 which permitted demolition of structures. Condition No.10 laid down that land occupied by India United Mill Nos.2 and 3 was to be handed over to the Municipal Corporation after removing the structures therein and condition No.11 laid down

that part of the land from New Hind Mills was to be handed over to MHADA, similarly after removing the structures. This had to be done as a condition precedent before the development permission for the lands of other NTC mills could be processed by the Municipal Corporation. NTC had thereafter sold the lands of 5 textile mills in auction held between February and October 2005. The interpretation placed by NTC on the user of land under D.C. Regulation 58 had been upheld by the Apex Court in its judgment rendered on 7th March 2006. He, therefore, submitted that after all these steps having been taken, it was too late in the day for the petitioners to prevent NTC from demolishing the structures on the concerned mill lands on the basis of Heritage listing and notice issued now in April 2006. He however stated that as of now NTC was concerned only with the demolition of the structures on the lands of India United Mills No.2 and 3 and New Hind Mills and there was no proposal to sell other mill lands or to demolish the structures thereon.

14. Mr.Singhvi, learned Senior Advocate appearing for the Municipal Corporation, supported the interpretation of the Petitioners on section 46 of the MRTP Act. He submitted that in view of the judgment of the Apex Court in the case of S.N. Rao (supra), a

proposal in the nature of the Heritage list, which had been duly published, had to be given due regard by the planning authority under section 46 of the MRTP Act. In his submission, no development could take place except after development permission in the nature of commencement certificate given under section 45 of the MRTP Act and, while giving that, the pendency of this list could not be ignored. He however fairly accepted that as far as some of the mills of NTC mentioned in condition Nos.10 and 11 above are concerned, the demolition of structures therein had already been cleared by the Municipal Corporation while it sanctioned the layout on 27th October 2004.

15. Mr.Pankaj Savant, learned counsel for Shriram Mills (Respondent No.20), submitted that the layout for development of the land of that mill had also been approved by the Municipal Corporation. The affidavit in support of its Notice of Motion No.226 of 2006 however does not mention that the layout permission in any way included the permission to demolish any of the structures.

16. (i). Mr.Virag Tulzapurkar and Mr.E.P. Bharucha, Senior Advocates, Mr.Mody and Mr.Kinkhabwala appearing for Mukesh Mills, Mumbai Textile Mills,

Mafatlal Industries Ltd., Dawn Mills, Morarjee Realties Ltd., Prakash Mills and Khatau Mills, adopted the submissions of Mr.Naphade. They submitted that there was hardly anything of heritage value amongst the structures which are sought to be retained on those private textile mills. They also pointed out that the concept of "precincts" was not clear and it would mean the entire textile mill. That cannot be said to be the intention behind making the provision since it would lead to absurd results. Ms.Alpana Ghone pointed out that the Chimney which was sought to be protected in Victoria Mills was demolished some three years before and there was no application of mind on the part of MHCC. Mr.Shyam Mehta appearing for respondent Nos.11 to 14 - mills, however, stated that no heritage structures had been notified in those mills.

(ii). Mr.Dwarkadas, Senior Advocate appearing for Respondent No.15, an auction purchaser of the land of Elphinstone Textile Mills, drew our attention to the paragraphs of the judgment of the Apex Court in the case of Bombay Dyeing (supra) and particularly para 299 onwards. He pointed out that at the end of para 315, the Apex Court had held that the validity of sales of seven mills of NTC in pursuance of the BIFR scheme were not open to a further determination by the High Court.

In para 329, the Apex Court had recognised the rights of the bona fide auction purchasers. He submitted that the demolition under condition Nos.10 and 11 above has to be permitted otherwise it will lead to impossibility under section 65 of the Contract Act and NTC will have to refund the amounts which it had received. It is material to note, as pointed out by Mr.Dwarkadas and Mr.Naphade, that the purchasers of NTC property have acted in pursuance of the interim order dated 1.12.2005 and 31.1.2006 passed by the Supreme Court during the pendency of the SLP filed by the NTC against the High Court judgment in Writ Petition No.482 of 2005. They have demolished the structures in five mill lands and created third party interests. In the auction of the lands of NTC mills, it had received more than Rs.2000 crores, out of which about Rs.643.94 crores have been paid to the employees under Voluntary Retirement Scheme, Rs.84 Crores have been paid to workers towards PF and ESI dues and Rs.72 Crores are paid to banks and financial institutions towards one time settlement. It has to utilise the remaining amount for rehabilitation and modernization of other textile mills. Mr.Naphade and Mr.Dwarkadas submitted that if the petitioners want an interim relief, they must give an undertaking to pay damages by way of compensation as required under Rule 148 of High Court (Original Side) Rules for sustaining

prejudice to the respondents.

17. We have noted the submissions of the Counsel. To examine them, we will have to refer briefly to the relevant provisions of the MRTP Act and the D.C. Regulations. MRTP Act is an Act which contains provisions for orderly development in regions as well as in the towns. It contains the provisions for regional plans and for development plans with a view to ensure that the town planning schemes are made in a proper manner. Section 2(19) of the Act defines a "planning authority" to mean a local authority and it includes a special planning authority for notified areas. Section 2(9) defines a "development plan" to mean a plan for the development or redevelopment of the area within the jurisdiction of a planning authority and it includes revision of a development plan and proposals of a special planning authority for development of land within its jurisdiction. Section 2(7) defines "development" to mean the carrying out of the buildings, engineering, mining or other operations in or over or under, land or the making of any material change, in any building or land or in the use of any building or land or any material or structural change in any heritage building or its precinct. It further states that it includes demolition of any existing building, structure

or erection or part of such building, structure of erection and reclamation, redevelopment and lay-out and sub-division of any land.

18. (i). Chapter III of this Act contains provisions for the Development plan. Section 22 lays down as to what should be the contents of a Development plan and it states that it shall generally indicate the manner in which the use of land in the area of a Planning Authority shall be regulated and also indicate the manner in which the development of land therein shall be carried out. Thereafter it enumerates what the Development plan shall in particular provide so far as may be necessary for all or any of the matters which are listed therein. Clause (i) thereof reads as follows:-

> " (i) preservation of features, structures or places of historical, natural, architectural and scientific interest and educational value [and of heritage buildings and heritage precincts]."

Thus, there can be no difficulty in noting that preservation of heritage buildings and heritage precincts can be provided in the development plan.

(ii). Amongst others, Clause (m) of Section 22 lays down that the development plan may make provisions for controlling and regulating the use and development of land within the jurisdiction of a local authority and then lays down that it may include restrictions with respect to open space, percentage of building area for a plot, height and number of storeys, density of population allowed in the specified area, the use and purposes to which buildings or specified areas of land may or may not be appropriated, sub-division of plots, discontinuance of objectionable users of land in any area in reasonable periods, parking spaces and loading and unloading space for any building and the sizes of projections and advertisement signs and hoardings and other matters. The Development Control Regulations, which are referable to Section 22(m), were sanctioned by the State Government under Section 31(1) of the Act and came into force from 25th March 1991.

(iii). D.C. Regulation 58 amongst others provides for the development or redevelopment of lands of cotton textile mills where they are sick or closed or where they are not sick or closed for the purpose of their modernization. D.C. Regulation 67, which provides for conservation of heritage buildings and heritage precincts were published on 21st April 1995 and came

into force on 1st June 1995. These regulations apply to the listed buildings / heritage buildings and listed precincts / heritage precincts which are listed in the notification to be issued by the State Government. Regulation 67(2) provides for restriction on development/redevelopment/repairs, etc. which reads as follows:-

> **" 2. Restriction on Development / Redevelopment/Repairs etc.**
>
> (i) No development or redevelopment or engineering operation or additions, alterations, repairs, renovation including the painting of buildings, replacement of special features or demolition of the whole or any part thereof or plastering of said listed/heritage buildings or listed/Heritage precincts shall be allowed except with the prior written permission of the Commissioner. The Commissioner shall act on the advice of/in consultation with the Heritage Conservation Committee to be appointed by Government (hereinafter called "the said Heritage Conservation Committee"):

Provided that in exceptional cases for reasons to be recorded in writing the Commissioner may overrule thee recommendation of the Heritage Conversation Committee:

Provided that the power to overrule the recommendations of the Heritage Conservation committee shall not be delegated by the Commissioner to any other officer.

(ii) In relation to religious buildings in the said list, the changes, repairs, additions, alterations and renovations required on religious grounds mentioned in sacred texts, or as a part of holy practices laid down in religious codes shall be treated as permissible, subject to their being in accordance and consonance with the original structure and architecture, designs, aesthetics and other special features thereof. Provided that before arriving at his decision, the Commissioner shall take into consideration

the recommendations of the Heritage Conservation Committee.

(iii) (a) Provisions of Regulation 67 would be applicable only in Grade I and Grade II category of Heritage Building for reconstruction and redevelopment of old buildings undertaken under Regulation 33(7), 33(8) and 33(9) of these Regulations;

(b) In case of redevelopment of cessed building from Grade III and precincts, special permission from the Municipal Commissioner, Municipal Corporation of Greater Mumbai may be obtained if the height of the building exceeds 24 metres (excluding height of stilt on ground floor."

19. (i). D.C. Regulation 67(3) provides that the list of buildings to which these Regulations apply shall not form part of this Regulation for the purposes of Section 37 of the MRTP Act. Section 37 of the Act provides for the manner in which modification of a final development plan can be brought upon. D.C. Regulation

67(3) provides that this list may be supplemented, altered, deleted or modified from time to time by Government on receipt of proposals from the Commissioner or from the Heritage Conservation Committee. It further provides that before the list is supplemented, altered, deleted or modified, objections and suggestions are to be invited and they are to be duly considered by the Commissioner and/or by Government.

(ii). D.C. Regulation 67(10) provides for the grading of the listed buildings such as Grade I, II or III. As far as Grade-I buildings are concerned, they are supposed to be buildings of national or historical importance and no intervention is to be permitted either on the exterior or interior except for strengthening and prolonging the life of the buildings or precincts. Grade-II structures are of regional or local importance and therein adaptive reuse is permitted. Grade-III are those which are important for town scape and therein changes such as extensions, additional buildings etc. are permitted. In the list which the MHCC has prepared it has allotted these grades to the various structures either belonging to the NTC mills or to the private mills.

20. Chapter IV of the MRTP Act deals with the

control of development and use of land included in the development plans. Section 43 thereof lays down that after the date on which the declaration of intention to prepare a development plan for any area is published no person shall institute or change the use of any land or carry out any development of land without the permission in writing of the Planning Authority. The proviso to this section lays down various exceptions and Clause (ii) permits the carrying out of work in compliance with any order or direction made by any authority under any law for the time being in force. Section 44 requires every person intending to carry out any development on any land to make an application in writing to the Planning Authority for its permission in the specified form. Section 45 provides for grant or refusal of permission and Section 46 lays down that the provisions of development plan are to be considered and kept in mind before granting any such permission. Sub-sections (i) and (ii) of Section 45 read as follows:-

> " 45. (1) On receipt of an application under section 44 the Planning Authority may, subject to the provisions of this Act, by order in writing -
>
> (i) grant the permission, unconditionally;

(ii) grant the permission, subject to such general or special conditions as it may impose with the previous approval of the State Government; or"

Section 46 reads as follows:-

" 46. The Planning Authority in considering application for permission shall have due regard to the provisions of any draft or final plan [or proposals] [published by means of notice] [submitted] or sanctioned under this Act."

21. The provisions of Section 46 came up for consideration before the Apex Court in the case of **S.N. Rao vs. State of Maharashtra reported in (1988) 1 SCC page 586.** Respondent No.5 in that matter had applied for development of a parcel of land at Bandra, Mumbai for putting up a Five-Star hotel. The application was rejected by the Municipal Commissioner on the sole ground that it was proposed to earmark the said land as a recreational ground. However, at the time when the Commissioner rejected the proposal submitted by respondent No.5, there was no such draft revised

development plan in existence. Yet the Commissioner rejected the proposal which was entertained by the Minister of State for Urban Development in appeal under Section 47 of the Act. The Minister's order was maintained by the High Court as well as by the Supreme Court. In para-7 of its judgment, the Apex Court noted that Section 46 of the Act provides that the Planning Authority in considering the application for permission, shall have due regard to the provisions of any draft or final plan or proposals published by means of notice submitted or sanctioned under the Act. In para-8 the Court observed that there can be no doubt that if there is any other material or relevant fact, section 46 does not stand in the way of such material or facts being considered by the Municipal Commissioner for the grant or refusal to grant or sanction any development plan. In the case before the Court, however, there was no draft revised development plan in existence. The Court subsequently noted in that paragraph that an order rejecting a development plan submitted by the owner of the land should be supported by some concrete material. In the absence of any such material, the rejection order could not be sustained.

22. The same view has been reiterated by a Division Bench of this Court in **Anahita Pandole vs. State of**

Maharashtra (supra) in para-15 of the judgment. That matter arose out of D.C. Regulation 67 on the question of hoardings on the heritage buildings. We are, however, informed that an SLP has been preferred against the said judgment and has been admitted by the Apex Court. Interim order passed in the said Special Leave Petition No.10168 of 2004 in the case of **M/s.V.R.Advertisers vs. Municipal Corporation of Brihan Mumbai on 4th June 2004** reads as follows:-

> " The petitioner is granted liberty to pray for listing of the matters before the next Vacation Bench on urgent basis. The respondent will take necessary instructions in the meanwhile.
>
> If the petitioners' building is not a listed heritage building, there will be order of status-quo.
>
> We make it clear that if the hoarding has already been removed the same shall not be re-erected. Similarly if any portion of it has been removed either wholly or partially it shall not be re-erected."

Thus, it is clear that there is no stay on the judgment of the High Court. The Apex Court has directed that the status quo to be maintained with respect to the buildings which are not listed heritage buildings.

23. In view of what is noted above, it is clear that under Section 46 of the Act the Planning Authority has to have due regard amongst others to the proposals published by means of notices. It also has the liberty to consider any other material or relevant fact while considering the application for permission for development. In para-11 of the reply on behalf of NTC to Notice of Motion No.64 of 2006 affirmed on 6.3.2006, it is submitted that "section 46 does not apply to a list which is not published in the manner prescribed under the Act and as such no injunction can be granted unless and until the list is published and the objections are invited". In the circumstances, now when the Heritage Committee has listed the Heritage buildings and precincts and objections and suggestions are invited with respect thereto, that will be a factor to be considered by the Commissioner when any application for development which includes application for demolition is made by any of the Mill companies.

24. (i). It is, however, material to note that as

far as NTC is concerned, it has submitted its lay out for division of its lands under D.C. Regulation 58 and that has been sanctioned by the Municipal Corporation on 27.10.2004 which decision is referable to Section 302 of the Mumbai Municipal Corporation Act, 1888. Condition Nos.10 and 11 of the approval of lay out read as follows:-

> " 10. That the plot admeasuring 32163.50 Sq.m. on the land of India United Mill No.2 & 3 which is proposed to be handed over to M.C.G.M. as shown in green in colour on the plan shall be cleared by demolishing the existing structures & shall be kept open & be handed over to M.C.G.M. before granting further C.C. for the development on (1) Mumbai Mill, (2) Jupiter Mill, (3) Elphinstone Mill, (4) Kohinoor Mill No.3 and (5) Apollo Mill and its property i.e. Morarka Bungalow.
>
> 11. That out of 36062.10 sq.m. of MHADA share, 27234.09 sq.mt. on the land of New Hind Textile Mills and 8828.01 sq.mt. on the land of India United Mill No.2 & 3 which is proposed to be handed over to

> MHADA (the land admeasuring 8828.01 sq.mt. will be subsequently shifted to other mill at the development of balance NTC mills on suggestion by Government) as shown in red colour on the plan, shall be cleared by demolishing the existing structure & shall be kept open & shall be handed over to MHADA before granting further C.C. for the development on (1) Mumbai Mill, (2) Jupiter Mill, (3) Elphinstone Mill, (4) Kohinoor Mill No.3 and (5) Apollo Mill and its property i.e. Morarka Bungalow."

(ii). Thus, this approval to the lay out division has been granted way back in October 2004. That was after obtaining the sanction from BIFR. The permission granted by BIFR was upheld by the Apex Court in its order passed on 27.9.2000 in the case of NTC (IDA) Employees' Assn. (supra) where it has observed "let the scheme as sanctioned by BIFR be implemented". This demolition is for carrying out the scheme for compensating the retrenched workers of the closed mills as also the redevelopment of other mills. It is a scheme in public interest as approved by BIFR as also by the Apex Court. Surely, the listing which has been now done in the year 2006, cannot be a ground to stop the

work of demolition in the mills under condition Nos.10 and 11. Mr.Rustomjee has contended that this approval of layout division does not amount to a development permission under Section 45 of the MRTP Act. The fact, however, remains that this approval in terms grants permission to demolish the structures on the concerned mills' lands under condition Nos.10 and 11 thereof. That is also a material factor which cannot be ignored under Section 46 of the Act. That would also be a development permissible under proviso (ii) of Section 43 of the MRTP Act. Besides, it is material to note that the Municipal Corporation is itself insisting that unless the land is made available to it after demolishing the structures for housing projects under condition Nos.10 and 11 above, it will not permit any development in the lands of other five NTC mills.

(iii). We may, however, note that as far as other mills of NTC or private textile mills are concerned, no such permission for demolition in their favour has been brought to our notice. They will have to obtain such appropriate development permission under Sections 44 and 45 of the Act and while granting that permission, the Commissioner of Municipal Corporation will have to have due regard to the list now published and to which suggestions and objections are invited.

25. At the same time, it is necessary that the decision on these lists ought to be arrived at at the earliest. In the circumstances, it will be desirable that after the objections are received by 22nd of May 2006, the designated officer of the Municipal Commissioner should decide them without any delay. We expect him to decide them within three months thereafter. The State Government is thereafter to take the final decision and issue the notification under Regulation 67(1) publishing the list. We expect the State Government to do the same within two months after receiving the report of the Commissioner. Needless to state that all the objections of the parties concerned will be considered by the Commissioner on merits, including that the structures concerned are not heritage structures or worth any architectural or historical or aesthetical value.

26. Before we pass the operative order, we may note that the State Government was to come out with the scheme to have a textile museum in the city which will also go towards preserving the historical aspects of the textile mills. On a query from the Court, the learned Advocate General could not make any positive statement in that behalf. All that we expect is that the State

Government will take the necessary steps at the earliest.

27. In the circumstances, we pass the following order:-

(a). As far as Notice of Motion No.200 of 2006 is concerned, it is clarified that respondent Nos.7 and 8 will be at liberty to carry out the work as permitted under condition Nos.10 and 11 of the lay out approval dated 27.10.2004. The order passed by this Court on prayer clause (a) in Notice of Motion No.64 of 2006 on 7th February 2006 will stand modified to that extent. To make it abundantly clear, the Heritage listing of items of Sr.Nos.70 to 78 concerning India United Mill Nos.2 and 3 and item No.81 of New Hind Textile Mill will not hinder the steps in pursuance of condition Nos.10 and 11 of lay out approval dated 27.10.2004. As far as the plans or proposals of NTC to demolish any other buildings are concerned, it will have to follow the due process of law, namely, obtaining the permission of the Municipal Corporation in that behalf. If there are any heritage structures therein, it will have to represent with respect to them to the Commissioner of Municipal Corporation and thereafter await the Government decision and if aggrieved take further appropriate steps. This

disposes of Notice of Motion No.200 of 2006 and prayer clause (a) of Notice of Motion No.64 of 2006.

(b). As far as prayer clause (b) of Notice of Motion No.64 of 2006 is concerned, there will be an interim injunction restraining the private Mills from demolishing, destroying or in any manner prejudicing the integrity of the 23 structures which have been listed except by following the due process of law. That will mean that they will have to submit the objections to the designated officer of the Municipal Corporation and await the Government decision and thereafter, if aggrieved, take appropriate legal steps. This disposes of prayer clause (b) of Notice of Motion No.64 of 2006 and Notice of Motion No.226 of 2006.

(c). The objections in pursuance of the notice published will be considered and a report will be made by the Delegate of the Municipal Commissioner to the State Government, preferably within three months from 22nd May 2006.

(d). The State Government will take its decision and issue necessary notification within two months from receipt of the report.

(e). All Motions stand disposed of.

(f). No order as to costs.

28. Before we part from these Motions, we make it clear that while deciding these Motions, we have gone into those aspects which were necessary for that purpose. All other aspects, on which we have not expressed our opinion, will be examined when the Petition is finally heard and decided.

(H.L. GOKHALE, J.)

(S.R. DONGAONKAR, J.)